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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-404

CITY OF PHILADELPHIA, CITY OF GLEN COVE, LANDFILL AND DEVELOPMENT COMPANY, MAC SANITARY LANDFILL, INC., KINSLEY'S LANDFILL, INC., and DeLORENZO-INTERSTATE WASTE REMOVAL CO., INC. (Now INTERSTATE WASTE REMOVAL CO., INC.),

Appellants,

v.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION OF THE STATE OF NEW JERSEY and RICHARD J. SULLIVAN, Commissioner of the Department of Environmental Protection of the State of New Jersey,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW JERSEY

BRIEF FOR NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION AS AMICUS CURIAE

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TABLE OF CONTENTS
BRIEF AMICUS CURIAE

Page

QUESTIONS PRESENTED 1

STATEMENT OF CASE 2

INTEREST OF AMICUS CURIAE 2

ARGUMENT

I. Solid and Liquid Waste and the Services Related to Disposal of Such Wastes are Legitimate Subjects of Interstate Commerce 5

II. P.L. 1973, c. 363, Discriminates Against Interstate Commerce in Violation of Article 1, Section 8, of the United States Constitution 13

III. Consideration of the Resource Conservation and Recovery Act of 1976, While Relevant to the Instant Case, Should Not Obscure the Important Constitutional Issue Presented by This Case 35

CONCLUSION 37

CERTIFICATE OF SERVICE 39

TABLE OF CITATIONS

Cases:

Alexandria Scrap Corp. v. Hughes, 391 F.Supp. 46 (D. Md. 1975), rev'd, 96 S.Ct. 2488 (1976) 7, 8, 10, 16, 22

American Can Co. v. Oregon Liquor Control Commission, 15 Ore. App. 618, 517 P.2d 691 (1973) 17

Asbell v. Kansas, 209 U.S. 251 (1939) 9

Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935) 17, 33

Best & Co., Inc. v. Maxwell, 311 U.S. 454 (1940) 33

Canton Poultry, Inc. v. Conner, 278 F.Supp. 822 (N.D. Fla. 1968) 15

Clason v. Indiana, 306 U.S. 439 (1939) 9

Cases, continued:

	Page
Construction Industry Association v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), cert. denied, 96 S.Ct. 1148 (1976)	16, 17
Crossman v. Lurman, 192 U.S. 189 (1904)	9
Dean Milk Co. v. Madison, 340 U.S. 349 (1951)	28
Douglas v. Seacoast Products, Inc., 97 S.Ct. 1740 (1977)	10, 26
Great Atlantic & Pacific Tea Co. v. Cottrell, 96 S.Ct. 923 (1976)	13, 17, 26, 27, 33
Hackensack Meadowlands v. Municipal Landfill Authority, 127 N.J. Super. 160, 316 A.2d 711 (Ch. 1974), rev'd, 68 N.J. 451, 348 A.2d 505 (1975)	9, 24
Head v. New Mexico Board of Examiners in Optometry, 374 U.S. 424 (1963)	15
Hunt v. Washington State Apple Advertising Commission, 97 S.Ct. 2434 (1977)	27
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960)	13, 14, 15, 17
J. P. Mascaro & Sons, Inc. v. William J. O'Hara, Inc., 1977-2 Trade Cases ¶61,727 (3d Cir. 1977)	10
National League of Cities v. Usery, 96 S.Ct. 2465 (1976)	23
Pennsylvania v. West Virginia, 262 U.S. 553 (1923)	17, 18, 19, 21, 23, 32, 33
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	13, 27, 34
Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361 (1964)	17
Portland Pipe Line Corp. v. Environmental Improvement Commission, 307 A.2d 1 (Me. 1973), appeal dismissed, 414 U.S. 1035 (1973)	17
Proctor & Gamble Co. v. City of Chicago, 509 F.2d 69 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975)	17
Sligh v. Kirkwood, 237 U.S. 52 (1915)	9

Cases, continued:

	Page
Toomer v. Witsell, 334 U.S. 285 (1948)	34
United States v. Bishop Processing Co., 287 F.Supp. 624 (D. Md. 1968), aff'd, 423 F.2d 469 (4th Cir. 1970), cert. denied, 398 U.S. 904	11
United States v. Pennsylvania Refuse Removal Association, 242 F.Supp. 794 (E.D. Pa. 1965), aff'd, 357 F.2d 806 (3d Cir. 1966), cert. denied, 384 U.S. 961	8, 10, 12
West v. Kansas Natural Gas Co., 221 U.S. 229 (1911)	17, 18, 20, 23, 31

Constitution and Statutes:

Federal Safe Drinking Water Act, 42 U.S.C.A. §300f *et seq.* (Supp. 1975)	25
Federal Water Pollution Control Act, 33 U.S.C.A. §1151 (Supp. 1975)	25
Pennsylvania Solid Waste Management Act, P.L. 788, as amended, 1974 P.A. 337	32
Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901 *et seq.* (Supp. 1975), amending Federal Solid Waste Disposal Act of 1965, 42 U.S.C. §3251 *et seq.* (1970)	31, 35, 36, 37
United States Constitution, Article 1, Sec. 8, cl. 3	2, 5
United States Constitution, Article VI	2, 35

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Appellees.

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QUESTIONS PRESENTED

1. Are solid and liquid waste and the services related to disposal of such wastes subjects of interstate commerce for purposes of the protection of the United

States Constitution, Article I, Section 8, against state attempts to regulate interstate commerce?

2. Does a state statute that prohibits the entry into the state of solid or liquid waste (except garbage to be fed to swine in the state) collected outside the state, discriminate against or place an undue burden on interstate commerce in violation of Article I, Section 8, of the United States Constitution?

3. To what extent does the Resource Conservation and Recovery Act of 1976 relate, under the United States Constitution, Article VI, to a state statute that prohibits the entry into the state of solid and liquid waste collected outside the state?

STATEMENT OF THE CASE

The statement of the case set forth in the Brief of Appellant City of Philadelphia et al. is adopted herein.

INTEREST OF AMICUS CURIAE

The National Solid Wastes Management Association is a trade association based in Washington, D.C. which represents all major segments of private industry engaged in the solid waste field. This membership comprises over 2,000 contractor members, companies which are directly engaged in the collection, processing, transportation and disposal of residential and commercial waste material. Such members range from large, New York Stock Exchange–listed firms having operations throughout the United States to small family-operated one- or two-truck operators engaged in limited local markets. Aggregately, private industry engaged in solid waste collection and disposal is responsible for approximately half of the residential solid waste and

over 90 percent of the commercial and industrial liquid and solid waste collected and disposed of in the United States. *The Private Sector in Solid Waste Management, A Profile of Its Resources and Contribution to Collection and Disposal*, U.S. Environmental Protection Agency, SW-51d.1 (1973), p. 1.9. The Association's membership also includes owners and operators of landfill disposal facilities, manufacturers of virtually all types of equipment involved in the solid waste field and companies engaged in recovery of materials and energy from the solid waste stream. The Association is the recognized spokesman for the private solid waste industry before the federal government and state legislative and executive bodies and has participated extensively at all levels of government in the formulation of laws and policies dealing with improved environmental and economic standards for the collection, processing, disposal, and recovery of solid wastes.

The issues presented in the instant case have broad implication for the business of the Association's membership and the quality and cost of the services they are able to provide to the public. Proper disposal of solid waste has become a serious and increasingly expensive undertaking, in some situations a crisis, throughout the country. In addition to the greater awareness of the potential hazards to public health and safety posed by irresponsible methods of disposal, more stringent air emission standards have caused a closing down of incinerators throughout the country, thus creating even greater reliance upon land disposal. Increased attention to water pollution at federal and state levels has drawn attention to the effects of land disposal on underground water, a concern that has been intensified by the diversion of increasing volumes of

liquid waste to land disposal facilities in areas where dumping into streams and rivers had previously been permissible.

In facing these environmental needs, states have pursued a broad range of solutions. Major focus has been given to long-term regional planning for waste disposal and land use. In many areas massive resource recovery programs have been initiated. These have been the directions urged and to some extent financed by the federal government through the Solid Waste Act of 1965, 42 U.S.C. §3251 et seq., the Resource Recovery Act of 1970, 42 U.S.C. §3254 et seq., and the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901 et seq., legislation premised upon the concept of cooperation among state and local governments to deal with a widespread problem that knows no state or local boundaries.

In a few instances, however, in desperation at the quantity of waste material to be absorbed and the difficulty in obtaining suitable land disposal sites due to increased public resistance and local zoning restrictions, resort has been made to laws or ordinances, such as that of the State of New Jersey in the instant case, to prohibit importation of waste material across state or other jurisdictional lines. Such action imposes immediate and direct restraints upon, and threatens economic injury to, private firms operating or using land disposal sites. Moreover, it is a form of action that cannot be isolated. Jurisdictions deprived of access to traditional disposal sites beyond their boundaries will respond with similar barriers. Eight states have already instituted such import restrictions in one form or another,[1] and it is

[1] Jurisdictional Statement 30-31.

our understanding that many other states and local jurisdictions are considering similar measures but are withholding action pending the outcome of this case. If the New Jersey Supreme Court's decision is allowed to stand, amicus believes that non-importation legislation will proliferate, and that this regressive and discriminatory approach, rather than the positive regional approach sanctioned by Congress and now pursued by many states, will substantially dictate the future direction of solid waste management policies throughout the United States. The New Jersey statute presents a major impediment to sound forward-looking regional policies. This impediment will be eliminated by a decision of this Court that such a provision is in conflict with the commerce clause of the United States Constitution.

ARGUMENT

I.

SOLID AND LIQUID WASTE AND THE SERVICES RELATED TO THE DISPOSAL OF SUCH WASTES ARE LEGITIMATE SUBJECTS OF INTERSTATE COMMERCE.

Appellees have argued below that the collection, treatment and disposal of solid and liquid wastes do not fall within the scope of the commerce clause of the Constitution, Article 1, Section 8. The basis for appellees' argument in this regard appears to be that waste products are not legitimate subjects of interstate commerce because they are nonmerchantable and allegedly injurious to the public health.

It cannot be plausibly asserted that waste materials are without actual or potential value. It is universally recognized that waste products are an increasingly important source of resource recovery and energy genera-

tion,[2] and that the disposition of waste materials is a significant aspect of land reclamation programs.[3] Moreover, the increased attention directed at enhancing the range of valuable end uses of waste materials, coupled with the development of increasingly sophisticated technologies, indicate that the spectrum of possible uses of waste materials will continue to be substantially broadened in the future.

Apart from the importance of waste materials for the purposes discussed above, the distinction suggested by the appellees and the New Jersey Supreme Court below, 68 N.J. at 468, between valuable and "valueless" waste materials fails to recognize that the value or merchantability of waste materials often depends to a significant extent, and perhaps more so than in any other industry, on the marketplace rather than on any intrinsic qualities of the "waste" materials in question. In recent years the demand for many "waste" materials, and thus a chief determinant of the value of such materials, has fluctuated considerably, depending on external economic factors including the supply and demand behavior of other industries. Thus, any attempt to categorize waste materials as intrinsically "valueless" or nonmerchantable misperceives an essential economic characteristic of the waste management industry. Therefore, to adopt such a distinction for purposes of commerce

[2] *See, e.g., Solid Waste Management Forecasts—A Projection of Trends Likely to Occur: Storage, Collection, Processing, Recovery, and Disposal*, National Solid Wastes Management Association Technical Bulletin (March/April 1976); *Resource Recovery From Solid Wastes—A Progress Report*, National Solid Wastes Management Association Technical Bulletin (June 1976).

[3] *See, e.g., Sanitary Landfills: Potential Land Uses for the Future*, National Solid Wastes Management Association Technical Bulletin (January 1976).

clause analysis in cases involving the waste management industry would be to adopt an artificial, inaccurate and obviously unmanageable criterion.

In a context closely analogous to the present case, the federal district court for the district of Maryland has held that the movement of automobile hulks across state lines constitutes interstate commerce. *Alexandria Scrap Corp. v. Hughes*, 391 F. Supp. 46, 59 (D. Md. 1975), *rev'd on other grounds*, 96 S. Ct. 2488 (1976). (It is particularly significant that automobile hulks are expressly included within the definition of "bulky waste" in the rules of New Jersey's Bureau of Solid Waste Management. N.J.A.C. 7:26-1.4.3.) In that case the district court faced the issue whether a Maryland statutory scheme designed to rid the state of abandoned vehicles through the use of bounties and assessments violated the commerce clause of the federal constitution.

In making the initial determination that the movement of automobile hulks across state lines constituted interstate commerce, the court in *Alexandria Scrap* found that "the movement of vehicles across state lines involving plaintiff is substantial." *Id.* at 59 n.28. Judged by the substantiality of interstate business in the items involved, it can hardly be doubted that the movement of waste products across state lines, which constitutes a substantial portion of the refuse removal industry's business activity, clearly constitutes interstate commerce. And, while the Supreme Court in *Alexandria Scrap* reversed the district court and thereby upheld the constitutionality of the Maryland statutory scheme, the Court did not dispute the lower court's finding that the transportation of automobile hulks was a valid subject of interstate commerce.

Even aside from the acknowledged merchantable qualities of waste in the present day that obviously bring it within the constitutional sense of commerce, the contention that the movement of wastes does not fall within the ambit of the commerce clause also ignores the crucial point that the service of collecting, transporting and disposing of such waste materials constitutes interstate commerce.[4] This principle was clearly established in *United States v. Pennsylvania Refuse Removal Association*, 242 F. Supp. 794 (E.D. Pa. 1965), *aff'd*, 357 F.2d 806 (3d Cir. 1966), *cert. denied*, 384 U.S. 961, wherein the district court stated:

> Here, the real subject of "trade or commerce" was not worthless debris, but the valuable service of removing and disposing of it. Since services are encompassed within the meaning of the word "trade or commerce" as used in the [Sherman] Act, United States v. National Association of Real Estate Boards, 339 U.S. 485, 488-492, 70 S.Ct. 711, 94 L.Ed. 1007 (1950), the defendants' position has no merit.

242 F. Supp. at 799. This holding was expressly affirmed by the court of appeals for the Third Circuit, which declared, "... refuse transported from Pennsylvania to New Jersey and disposed of in the latter state ... was plainly a proper subject of interstate commerce." 357 F.2d at 808.

The decisions of the district and circuit courts in *Pennsylvania Refuse Removal, supra*, recognized a fundamental fact that appellees have previously at-

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[4] *Cf. Hughes v. Alexandria Scrap Corp.*, 96 S. Ct. at 2502 (Brennan, J., dissenting): "[T]he Court does not and could not find that the market for scrap metal—including its processing—is not interstate commerce."

tempted to obscure by characterizing the instant case as indistinguishable from those Supreme Court decisions holding that nonmerchantable items are not within the protection of the commerce clause, *see, e.g., Clason v. Indiana*, 306 U.S. 439 (1939) (animal carcasses); *Asbell v. Kansas*, 209 U.S. 251 (1908) (unhealthy swine or cattle); *Crossman v. Lurman*, 192 U.S. 189 (1904) (noxious or decayed foods); *Sligh v. Kirkwood*, 237 U.S. 52 (1915) (immature citrus fruit). As the trial court in *Hackensack Meadowlands Development Commission v. Municipal Sanitary Landfill Authority*, 127 N.J. Super. 160, 169-170, 316 S.2d 711 (Ch. 1974), correctly recognized, this line of cases

> classified the matter (diseased animals, adulterated food, fruit unfit for human consumption) as non-merchantable. In all the food and drug cases the articles were banned to protect the public from mistaking them for pure and wholesome foods and to prevent the spread of disease.

However, in considering whether the service of collecting, transporting and disposing of waste materials constitutes interstate commerce, the contention that some waste materials may not in and of themselves be "merchantable" – an argument that at best is seriously misleading and inaccurate for reasons discussed previously – only begs the question at issue, since the business of removal and disposition of such materials as may be nonmerchantable is a direct function of their nonmerchantability. Because the refuse removal industry deals partly in presently nonmerchantable materials, appellees would exclude this industry, or at least a substantial part thereof, from the scope of commerce clause protection, despite the fact that the very function of this industry and the reason for its

existence and its strictly regulated character is to provide the public with the essential *service* of removing and disposing of nonmerchantable materials which *otherwise* could pose health problems. The obvious fallacy of appellees' position was recognized by the district court in *Pennsylvania Refuse Removal, supra*, when the court declared that focusing on the nonmerchantability of some waste materials "misse[d] the point" since the essential subject of trade or commerce was the vital service of removing and disposing of such materials. 242 F. Supp. at 799.

In asserting that the commercial movement of waste materials across state lines does not constitute interstate commerce,[5] appellees have previously contended that *Pennsylvania Refuse Removal* is inapposite since that case dealt with interstate commerce in the context of the enforcement of a federal statute (the Sherman Act) rather than in the context of commerce clause limitations on a state's police power (i.e., the so-called "positive" versus "negative" implications of the commerce clause, *see* 68 N.J. at 469; *Douglas v. Seacoast Products, Inc.*, 97 S. Ct. 1740, 1754 n.25 (1977) (Rehnquist, J., concurring in part and dissenting in part.) Three points warrant mention in response to this contention.

First, the case of *Alexandria Scrap Corp. v. Hughes*, discussed *supra*, which held that the movement of automobile hulks across state lines was interstate

[5]Questions such as whether the activity involved is a "local" rather than interstate activity, or whether the products involved have come to rest in the state—questions which may be relevant in cases involving state regulation or taxation of goods assertedly in interstate commerce, *see, e.g., J. P. Mascaro & Sons, Inc. v. William J. O'Hara, Inc.*, 1977-2 Trade Cases ¶61,727 (3d Cir. 1977)—are not involved in the present case.

commerce, did not deal with the enforcement of a federal statute, but rather dealt with precisely the same issue as is presented by the instant case – the scope of the commerce clause of the federal constitution as a limitation on a state's police power.

Second, while this Court, in cases involving the imposition of incidental burdens on interstate commerce, has often acknowledged a state's power to effectuate legitimate local interests, this recognition does not properly go to the *jurisdictional* question of whether interstate commerce is involved, but rather concerns the issue on the merits of accommodating federal and state interests. Thus, the appellees' attempt to dismiss the threshold "in commerce" determination of the court in *Pennsylvania Refuse Removal, supra*, involves considerations not properly at issue in ascertaining whether a particular activity constitutes interstate commerce within the meaning of the commerce clause.

Third, even assuming for purposes of argument that in certain instances an interstate activity properly subject to federal regulation under the commerce clause would not be within the ambit of the commerce clause for purposes of a challenge to state regulation, such a distinction is clearly inappropriate when applied to the interstate solid waste industry. It is perhaps conceivable, for example, that air pollutants drifting across state lines, while clearly subject to federal regulation, *see, e.g., United States v. Bishop Processing Co.*, 287 F. Supp. 624 (D. Md. 1968), *aff'd*, 423 F.2d 469 (4th Cir. 1970), *cert. denied*, 398 U.S. 904, would not be classified as within the commerce clause if a state attempted to regulate the flow of such material into its territory.

Ambient air pollution, of course, is not the subject of a legitimate and substantial interstate commercial activity. The transportation of solid wastes, and the services related thereto, however, are of an entirely different character since these activities have long been recognized as legitimate *commercial* activities. Thus, as the court in *Pennsylvania Refuse Removal, supra*, recognized, it is not so much the intrinsic quality of the subject matter as rather the nature and substance of the commercial activity involved that should determine whether such activity is embraced by the commerce clause. Where, as here, a legitimate, substantial, and indeed socially vital *commercial* activity is involved, it cannot reasonably be held that such an established activity in interstate commerce is not entitled to the protection of the commerce clause. This was recognized by the courts in *Pennsylvania Refuse Removal, supra*, and the fact that such recognition was made in a case involving a federal statute does not diminish the analytical soundness of the courts' determination of whether an activity should realistically be viewed as a proper subject of interstate commerce.

In sum, then, appellees' arguments below, and the analysis of the New Jersey Supreme Court, fail to recognize existing precedent holding that the commercial movement of waste materials across state lines falls within the scope of the commerce clause, and ignore the substantial and essential interstate commercial character of the refuse removal industry.

II.

PUBLIC LAW 1973, CHAPTER 363, DISCRIMINATES AGAINST INTERSTATE COMMERCE IN VIOLATION OF ARTICLE 1, SECTION 8, OF THE UNITED STATES CONSTITUTION.

In *Great Atlantic & Pacific Tea Co. v. Cottrell*, 96 S.Ct. 923, 928 (1976), this Court reiterated the prevailing test for determining the validity of state statutes affecting interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 816, 4 L.Ed.2d 852. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) (footnote omitted).

It is clear that, under the standard articulated in *Huron Cement Co. v. Detroit, supra*, and reaffirmed in *Pike v. Bruce Church, Inc., supra*, and *Great Atlantic & Pacific Tea Co. v. Cottrell, supra*, the statute in the instant case is not an evenhanded regulation, but rather prohibits the disposal of waste material solely on the basis of the origin of such material. In this manner the statute, in purpose and effect, discriminates only against wastes collected outside New Jersey. Such a statute is distinguishable, therefore, from statutes or regulations involved in cases in which a state or locality attempted to regulate nondiscriminatorily particular activities

which had some effect on interstate commerce. *See, e.g., Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963); *Huron Cement Co. v. Detroit, supra.*

A particularly pertinent example of such a nondiscriminatory regulation case is *Huron Cement Co. v. Detroit, supra*, which was relied upon by the New Jersey Supreme Court below in asserting that "the preservation of the environment and the protection of ecological values are, without more, sufficient to warrant an exercise of this [the state's police] power." 68 N.J. at 473. In *Huron*, the regulation in question restricted the amount and density of pollution emitted by vessels docked in the city of Detroit. In upholding the ordinance against the challenge of discrimination against interstate commerce, the Court declared:

> State regulation, based on the police power, *which does not discriminate against interstate commerce* or operate to disrupt its required uniformity, may constitutionally stand. Hennington v. State of Georgia, 163 U.S. 299, 16 S.Ct. 1086, 41 L.Ed. 166; Lake Shore & Michigan Southern Railway Co. v. State of Ohio, 173 U.S. 285, 19 S.Ct. 465, 43 L.Ed. 702; Pennsylvania Gas Co. v. Public Service Commission, 252 U.S. 23, 40 S.Ct. 279, 64 L.Ed. 434; Milk Control Board of Pennsylvania v. Eisenberg Farm Products, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752; Bob-Lo Excursion Co. v. People of State of Michigan, 333 U.S. 28, 68 S.Ct. 358, 92 L.Ed. 455.
>
> It has not been suggested that the local ordinance, applicable alike to "any person, firm or corporation" within the city, discriminates against interstate commerce as such. It is a regulation of general application designated to better the health and welfare of the community.... We conclude that no impermissible burden on commerce has been shown.

362 U.S. at 448 (emphasis added). Thus, the ordinance in *Huron* did not involve any discrimination against interstate commerce and therefore presented an entirely different situation than does the New Jersey statute, which, while purportedly aimed at environmental problems, discriminates solely against interstate commerce while neglecting entirely any environmental considerations arising from the collection and disposition of wastes within New Jersey.

The principle enunciated in *Huron* that a state regulation based on the police power must be nondiscriminatory has been followed by this Court and by the lower federal courts in numerous instances. In *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), the Court upheld a New Mexico statute which prohibited certain forms of advertising. Although the Court found that the trial court's injunction against the appellants "unquestionably imposed some restraint upon that [interstate] commerce," *id.* at 427-28, the Court upheld the statute as a measure directly addressed to protection of the public health. In reaching its conclusion the Court, citing *Huron*, noted that, "It has not been suggested that the statute, applicable alike to 'any person' within the State of New Mexico, discriminates against interstate commerce as such." 374 U.S. at 429. Similarly, in *Canton Poultry, Inc. v. Conner*, 278 F. Supp. 822 (N.D. Fla. 1968), the court upheld a Florida poultry law providing for inspection, grading and tagging of poultry products sold within the state. In so holding, the court stated:

> State legislation, based on police power, which does not discriminate against interstate commerce

> is not in conflict with the Commerce Clause. See *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852. The state act is applied to locally produced poultry offered for sale in Florida as well as poultry shipped into the State. Any burden which might result from compliance with the state law rests equally upon the local distributors, and is therefore nondiscriminatory.

278 F. Supp. at 825. See also *Construction Industry Association v. City of Petaluma*, 522 F.2d 897, 909 (9th Cir. 1975), *cert. denied*, 96 S.Ct. 1148 (1976) ("since the local regulation here is rationally related to the social and environmental welfare of the community and does not discriminate against interstate commerce or operate to disrupt its required uniformity, appellees' claim that the [regulation] unreasonably burdens commerce must fail." (footnote omitted).

And, in *Hughes v. Alexandria Scrap Corp.*, discussed *supra*, one of this Court's most recent encounters with a commerce clause challenge to a state regulation, the Court made clear that a Maryland statutory scheme designed to rid the state of automobile hulks did not by its terms prohibit interstate commerce. In comparing the case before it to cases involving discriminatory or burdensome regulations of interstate commerce, the Court observed:

> The common thread of all these [prior] cases is that the State interfered with the natural functioning of the interstate market either through prohibition or through burdensome regulation. By contrast, Maryland has not sought to prohibit the flow of hulks, nor to regulate the conditions under which it may occur.

96 S. Ct. at 2496.

The New Jersey Supreme Court, in citing judicial decisions supporting a state's power to enact health and environmental legislation, cited cases within the category of nondiscriminatory regulation. 68 N.J. at 476, *citing Huron Cement Co. v. City of Detroit, supra; Construction Industry Association v. City of Petaluma, supra; Proctor & Gamble Co. v. City of Chicago*, 509 F.2d 69 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975); *American Can Co. v. Oregon Liquor Control Commission*, 15 Ore. App. 618, 517 P.2d 691 (1973); *Portland Pipe Line Corp. v. Environmental Improvement Commission*, 307 A.2d 1 (Me. 1973), *appeal dismissed*. 414 U.S. 1035 (1973). In all of the above-cited cases, therefore, including *Huron*, there is no question raised as to discrimination exclusively against interstate commerce. The instant case, however, puts in issue precisely such a discriminatory regulation aimed solely at the interstate transportation and disposition of waste materials. Thus, the instant case directly parallels those cases wherein a state, for whatever ostensible reason, attempts to curtail the flow of commerce across state lines. See, e.g., *Great Atlantic & Pacific Tea Co. v. Cottrell, supra; Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964); *Baldwin v. G.A.F. Seelig*, 294 U.S. 511 (1935); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

In an attempt to justify the wholly discriminatory nature of P.L. 1973, c. 363, the appellees and the New Jersey Supreme Court have attempted to categorize as impermissible only such discriminatory statutes as manifest a blatant attempt by the enacting state to erect barriers to competition for the economic and

commercial advantages of the regulating state. Illustrative of this attempt at facile categorization is the cursory treatment by the New Jersey Supreme Court of the "natural gas" cases, *West v. Kansas Natural Gas Co., supra*, and *Pennsylvania v. West Virginia, supra*. In rejecting the rationale of the state's trial courts, the New Jersey Supreme Court declared:

> In those cases the state effort was to preserve and exploit a resource for selfish economic and commercial gain; here it is to protect the health of its citizens and give some measure of precarious protection to its natural environment. The distinction is clear and it is basic.

68 N.J. at 447. The appellees' and the New Jersey Supreme Court's characterization of the aforementioned two cases clearly does not, however, fully address the facts and the Supreme Court's reasoning in these cases, particularly as articulated in *Pennsylvania v. West Virginia, supra*. In that case the Court recognized the appellant's contention that the statute was a vehicle to conserve an essential and dwindling natural resource. Specifically, the appellants' argument, identical in substance to that of the appellee state of New Jersey in the instant case, was that:

> [T]he gas is a natural product of the state and has become a necessity therein, that the supply is waning and no longer sufficient to satisfy local needs and be used abroad, and that the Act is therefore a legitimate measure of conservation in the intersts of the people of the state.

Id. at 665. The Court's response to this argument was direct and unequivocal:

> *If the situation be as stated,* it affords no ground for the assumption by the state of power to regulate interstate commerce, which is what the Act attempts to do.

Id. (emphasis added). Thus, contrary to appellees' and the New Jersey Supreme Court's characterization of the "natural gas" cases, these cases indicate that this Court recognized the possible conservation values and objectives underlying the statutes in question and nonetheless invalidated the statutes as impermissibly interfering with interstate commerce. These cases, therefore, do not, as appellees seem to suggest, present the same considerations as are present in cases wherein the statutes involved had no valid conservation or health purposes, but rather sought only to protect local merchants from out-of-state competition. Consequently, the arguments of the appellees and the decision of the New Jersey Supreme Court fail to distinguish adequately the "natural gas" cases from the instant case. To the contrary, these cases, as the Supreme Court recognized, did not involve attempts to frustrate interstate competition solely for selfish economic reasons, but rather involved statutes designed to preserve a state's dwindling natural resources by restricting the use by other states of the enacting state's natural resources. This is precisely the type of action which New Jersey has attempted by shutting out from landfill sites in New Jersey wastes collected in other states.

Moreover, it is of no consequence that the "natural gas" cases prohibited exports while the New Jersey statute in question bans imports,[6] for as the Court in *Pennsylvania v. West Virginia, supra*, recognized:

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[6]In a sense, of course, P.L. 1973, c. 363, may be viewed as a prohibition of exports in that the statute seeks to eliminate the "export" of New Jersey landfill services to out-of-state customers.

> A state law, whether of the state where the gas is produced or *that where it is to be sold*, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce—a prohibited interference.

262 U.S. at 665 (emphasis added). It is apparent from the quoted language that the Court was focusing on the interruption of the flow of interstate commerce and not on whether such interruption resulted from the producing or recipient state. Similarly, the New Jersey statute, a statute of the state into which the flow of commerce is directed, produces the same discriminatory interruption of interstate commerce as was condemned in the "natural gas" cases discussed above.

In analyzing the N.J. Supreme Court's attempt to distinguish the natural gas cases from the present case by asserting that the former cases involved state efforts to "preserve and exploit a resource for selfish economic and commercial gain", 68 N.J. at 477, it should be recognized that the statutes in those cases restrained *domestic* producing companies from selling natural gas to out-of-state customers. Clearly, then, the statutes did not benefit domestic producers. Thus, any "selfish economic and commercial gain" in the natural gas cases could have come only from the possibility that the operations of domestic business *consumers* of natural gas would be furthered by ensuring those businesses an adequate gas supply. It was evidently in this respect that the Supreme Court characterized the purpose of the statute in *West v. Kansas Natural Gas Co., supra*, as "in a sense commercial – the business welfare of the state. . . ." *Id.* at 255.

This potential commercial benefit for local consumers in the natural gas cases, however, is certainly no

different qualitatively than the economic benefits realizable by domestic businesses in the instant case. Undoubtedly, by preventing New Jersey landfill operators from dealing with out-of-state waste materials, New Jersey commercial and industrial concerns will be assured more local landfill space for their own refuse. Consequently, these local businesses, as well as local residents, will be spared the higher costs associated with disposing of their refuse at landfill sites at more distant locations. That this cost factor is both a real and significant consideration is evident in the fact that both the Governor of New Jersey and the state's Department of Environmental Protection at various times acknowledged that attempts to ban importation of out-of-state wastes into New Jersey were partly motivated by the desire to control the costs of solid waste collection and disposal for the benefit of local residents and businesses. *See* Jurisdictional Statement 10-12, 38-39. If, then, it is important substantively to view the purpose of the statutes in the natural gas cases as being "in a sense commercial", it is abundantly clear that the statute in the instant case presents at least as much evidence of commercially benefiting local interests at the expense of out-of-state interests as did the statutes in the natural gas cases.

It is no answer to the discriminatory nature of P.L. 1973, c.363, to contend, as appellees have at various stages of this litigation, that landfill disposal is a "quasi-public" function related to the provision of necessary government services, and, therefore, that discriminatory legislation restricting landfill availability only to in-state businesses and residents somehow should be accorded special deference under commerce clause analysis. In *Pennsylvania v. West Virginia, supra*,

West Virginia argued that the transportation of natural gas was a quasi-public business providing essential services to West Virginia residents. Yet the Court found such argument no obstacle to invalidating legislation which restricted the availability of this natural resource to local consumers.

Moreover, the argument that New Jersey need not provide or make available essential public services to residents of other states is indeed curious in the context of the instant case wherein the waste disposal services in question are provided by *private* concerns who own and operate the landfill sites which New Jersey seeks to preserve for local residents and businesses only. We do not contend that publicly owned and operated facilities in New Jersey, such as public schools, hospitals or recreation areas, must be made available to residents of other states. If New Jersey established new *public* landfill sites or exercised its powers of eminent domain as to existing private landfill sites, and subsequently restricted those sites to wastes collected in-state, a different question might be raised. *Cf. Hughes v. Alexandria Scrap Corp., supra.*[7] But here New Jersey is

[7]To the extent *Alexandria Scrap* is relevant at all to the instant case, it appears, if anything, to support appellants' position. In that case the Court emphasized that, with respect to commerce in automobile hulks, "no trade barrier of the type forbidden by the Commerce Clause, and involved in previous cases, impedes their movement out of State. They remain within Maryland in response to market forces, including that exerted by money from the State. Nothing in the purposes animating the Commerce Clause forbids the State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* at 2497. Whatever the merits of the Court's holding, *see*, Brennan, J., dissenting, *id.* at 2501, it is clear that in the present case New Jersey is not "participating in the market" but rather is attempting to stop the flow of interstate commerce by a purely discriminatory statute.

directing in-state *private* businesses to cease making their facilities and services available to out-of-state residents, businesses and municipalities. Amicus submits that New Jersey cannot take such discriminatory action under the commerce clause any more than New Jersey could direct private utilities to cease dealing with out-of-state businesses or residents, *West Virginia v. Kansas Natural Gas Co., supra; Pennsylvania v. West Virginia, supra*, or any more than New Jersey could direct any other private businesses, even those of a "quasi-public" nature such as private hospitals or private schools, from offering their services to consumers in other states.[8]

In seeking to rationalize the discriminatory character of P.L. 1973, c. 363, appellees have asserted that the statute seeks to protect the public health, safety and welfare by eliminating or ameliorating purported health dangers associated with the disposal of waste materials. The assertion of such a position is somewhat curious in view of the fact that the state courts below recognized

[8]Clearly, the holding of this Court in *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976), is of no help to appellees. In that case the question raised was the scope of Congress' power under the commerce clause to regulate directly certain aspects of employment of state workers employed in traditional government services. The instant case, of course, does not involve a challenge to the exercise of Congress' power to regulate commerce. Perhaps more importantly from an analytical standpoint, however, the decision in *Cities* involved *state* employees in *public* employment. Had the issue been whether a state could successfully challenge Congress' attempt to legislate regarding *private* employees in quasi-public, private businesses, such as privately owned utilities, schools or hospitals, there can be no doubt that the result would have been different. Thus, the "state sovereignty" basis for the holding in *Cities* is simply inapposite in the instant case.

that P.L. 1973, c. 363, was not aimed at purported health problems. As the trial court in *Hackensack Meadowlands*, 127 N.J. Super. at 170, stated:

> It is not the danger to public health due to transportation of garbage in New Jersey or location of the garbage in a licensed landfill site in the State which is the evil that the Waste Control Act and the regulations are directed at. The purpose is conservation of the land used for disposal. . . .

To the same effect the trial judge in *City of Philadelphia v. New Jersey*[9] stated:

> [T]he purpose of the statute in question here is to conserve natural resources of the state, that by restricting the amount of solid waste . that is presented to the various disposal companies, the natural resources, the land, [and] the availability of the land will be prolonged or extended or used less quickly.

And the New Jersey Supreme Court observed:

> There is every indication that this [preventing acceleration of depletion of existing landfills] was the true reason for the enactment of the amendments to the Waste Control Act (P.L. 1973, c. 363).

68 N.J. at 465 n.10.

The appellees have never established that the importation of out-of-state wastes endangers the health or safety of New Jersey's residents. Rather, in attempting to circumvent the fact that there is no

[9]The opinion, which is not reported, is included in Appellants' Jurisdictional Statement.

qualitative difference between in-state and out-of-state wastes, the appellees have simply asserted, on the basis of incomplete and inadequate documentation, that the alleged health problems associated with sanitary landfills are necessarily aggravated by the increase in waste disposal resulting from the importation of out-of-state wastes.[10] Moreover, the appellees' allegation entirely ignores the fact that there exists strict regulation and inspection of land disposal facilities under state standards to insure the protection of public health. The rules of New Jersey's Bureau of Solid Waste Management are comprehensive in this regard. See N.J.A.C. 7:26-1 *et seq.* See also Pub. L. 92-500, 33 U.S.C.A. §1151 (Supp. 1975) (Federal Water Pollution Control Act); Pub. L. 93-523, 42 U.S.C.A. 300f (Supp. 1975) (Federal Safe Drinking Water Act). Thus, the appellees' assertions as to the relationship between the importation of out-of-state wastes and dangers to the health of New Jersey residents are simply not adequately supported in the evidence, and appellees have never attempted to refute the arguments made and the affidavits presented to the New Jersey Supreme Court demonstrating that the existing rules of the New Jersey Department of Environmental Protection, Bureau of Solid Waste Management, are totally adequate to protect the health, safety and welfare of New Jersey

[10]It is anomalous that the only exception to non-importation recognized in P.L. 1973, c. 363, is "garbage to be fed to swine in the State of New Jersey". Garbage, as defined in New Jersey, means putrescible wastes. N.J.A.C. 12:100-2.1. Such wastes are recognized as creating a greater health threat than nonputrescible wastes. The anomaly is compounded by the fact that hazardous and chemical wastes, which clearly may present health hazards far more serious than other forms of waste, are permitted into New Jersey by regulation of the Department of Environmental Protection. N.J.A.C. 7:1-4.2.

residents and the quality of New Jersey's environment.

What remains, therefore, of the asserted legitimacy of the local purposes ostensibly served by P.L. 1973, c. 363, is the contention that the statute will conserve or extend the life of existing landfills in the state.[11] Apart from the fact that the New Jersey Supreme Court's reliance on various studies undertaken at different times creates a confused and sometimes apparently contradictory assessment of the life expectancy of existing landfills in New Jersey, the extension of existing landfill life expectancy by the statute at most will be insubstantial. As the New Jersey Supreme Court recognized, the ban on importation of out-of-state

[11]At the outset, it is at least highly questionable whether a statute regulating only interstate commerce while leaving local interests untouched can properly be viewed as a conservation measure. On numberous occasions this Court has voiced its suspicions of discriminatory state statutes which purported to protect the health or welfare of its citizenry, *see, e.g., Atlantic & Pacific Tea Co. v. Cottrell, supra*, or were "cloak[ed] in the currently fashionable garb of environmental protection", *Douglas v. Seacoast Products, Inc.*, 97 S. Ct. 1740 n. 21 (1977).

Most recently, in *Douglas v. Seacoast Products, Inc., supra*, appellant argued that Virginia statutes which prevented nonresident appellees from fishing in Virginia waters had a "legitimate conservation purpose." Specifically, appellant argued that the respective statutory provisions were, in the Court's words, a "valid response to the grave problem of overfishing of American marine stocks by foreign fleets", and "an essential enforcement mechanism for net size restrictions on menhaden fishermen." The Court responded:

> The claims are specious. Virginia makes no attempt to restrict the quantity of menhaden caught by her own residents. *A statute that leaves a State's residents free to destroy a natural resource while excluding aliens or nonresidents is not a conservation law at all.*

Id. (Emphasis added).

wastes at best is a stop-gap measure which can, if effective, delay only minimally the predicted exhaustion of existing disposal sites.[12] Thus, the question is presented as to whether the imposition of a measure directly discriminating against interstate commerce can be justified when it only serves a local purpose which admittedly is insubstantial in consequence. The New Jersey Supreme Court's treatment of this question was cursory at best:

> Nor can it seriously be urged that the means employed were not suitable to the end sought to be attained. *Less than total exclusion of solid waste generated outside New Jersey would have been of no avail.*

68 N.J. at 475 (emphasis added).

Although this Court has properly been more suspect of discriminatory legislation intended to erect economic barriers against competition from out-of-state sources, the decisions of the Court have made it clear that even where legitimate areas of local concern are involved, the burden to be tolerated by the statute or regulation at issue will depend on the particular local interest and on whether such interest could be furthered by less burdensome or restrictive alternatives. *Hunt v. Washington State Apple Advertising Comm'n*, 97 S. Ct. 2434 (1977); *Great Atlantic & Pacific Tea Co., supra; Pike v. Bruce Church, Inc., supra.* With respect to the question of less burdensome alternatives, this Court has recently declared:

[12]The New Jersey Supreme Court stated, "It has also been estimated that a state-wide prohibition on solid waste originating elsewhere would lengthen the state-wide landfill life by approximately 8%...." 68 N.J. at 461. The court did not indicate specifically by whom such an estimate was made.

> Inquiry whether adequate and less burdensome alternatives exist is of course important in discharge of the Court's task of "accommodation" of conflicting local and national interests, since any "realistic judgment" whether a given state action "unreasonably" trespasses upon national interests must of course consider the "consequences to the State if its action were disallowed."

Great Atlantic & Pacific Tea Co., supra, at 929. In this case the Court examined Mississippi's argument that the state's mandatory reciprocity regulation on milk produced in other states enabled Mississippi "to assure itself that the reciprocating State's (here Louisiana's) health standards were the 'substantial equivalent' of Mississippi's." *Id.* at 930. The Court, rejecting the argument, stated that even if Mississippi's assertion were true, "there are means adequate to serve this interest that are substantially less burdensome on commerce. . . ." *Id.*

In *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), the Court considered a Madison, Wisconsin ordinance prohibiting the sale of milk in the city unless such milk had been processed at an approved pasteurization plant within five miles of the city. While the Court recognized that sanitary considerations pertaining to milk that originated in non-local areas could justify "regulat[ion] in the interest of the safety, health and well-being of local communities," *id.* at 353, the Court declared that such regulation could not stand "even in the exercise of [the city's] unquestioned power to protect the health and safety of its people, if *reasonable nondiscriminatory* alternatives, adequate to conserve legitimate local interests, are available." *Id.* at 354 (emphasis added). The Court struck down the Madison

ordinance on the grounds that such reasonable nondiscriminatory alternatives, adequate to serve local interests, existed.

In the instant case, the state of New Jersey has portrayed the present waste disposal situation in the state as a crisis situation. And the state has argued that the enactment of a non-importation statute was necessary to cope with this crisis because federal and regional solutions to the problem of waste disposal have not been forthcoming. Yet the state has failed to consider and evaluate alternatives within its reach that could alleviate the alleged problem without a blanket prohibition on the importation of wastes into New Jersey.

The state's Department of Environmental Protection ("DEP"), according to the sworn testimony of its principal environmental engineer, has not undertaken any studies to calculate the total acreage available for sanitary landfill purposes in the state of New Jersey. Thus, this critical question of the availability of suitable acreage within the state for landfill purposes was completely ignored by the New Jersey Supreme Court, and apparently has not been studied by the state agencies directly responsible for such matters. Rather, the appellees and the New Jersey Supreme Court have dwelt only on the contention that existing landfill sites will be more quickly exhausted if the importation of out-of-state wastes is allowed to continue. Even with respect to existing sites, however, the DEP's principal environmental engineer has testified that the life expectancy of existing landfills could be increased by utilizing various processing alternatives to reduce the weight and/or volume of solid waste materials. *Cf. Shredding of Municipal Solid Waste and Emerging*

Technology, National Solid Wastes Management Association Technical Bulletin (Dec. 1974). It was further stated in such testimony that the DEP, however, had not undertaken any studies to estimate the extent to which such processing alternatives could extend the life of existing landfills.

In addition, the Supreme Court of New Jersey did not discuss the availability of landfill sites outside New Jersey as a disposal alternative for wastes generated within New Jersey. Such an omission appears particularly curious in light of the practice of some New Jersey communities of disposing of wastes outside New Jersey. According to testimony of DEP's principal environmental engineer, no effort was ever made by DEP to consider the possibility of using out-of-state facilities for disposal of New Jersey wastes. This failure appears especially incongruous in light of the New Jersey Supreme Court's intimation that extraterritorial solutions to New Jersey's "crisis" were unavailable. 68 N.J. at 462-63. Ironically, the enactment of a non-importation ban threatens to completely eliminate the possibility of New Jersey residents using out-of-state disposal sites to the extent that the New Jersey statute invites sister states to retaliate by passing similar discriminatory legislation, as Pennsylvania has already done.

None of the possibilities outlined above apparently has been fully evaluated by the state of New Jersey as an alternative to a ban on importation of out-of-state wastes. Rather, the state has assumed or at least asserted the existence of a "crisis" situation and has acted precipitously without considering possible solutions other than the most drastic "solution"—blocking the free flow of interstate commerce in the transportation of waste materials into the state. Yet, in reality, the state of New Jersey's enactment of such a ban in effect dramatizes the state's reluctance to evaluate potentially available alternative approaches. In this respect, then, New Jersey's enactment of P.L. 1973, c. 363, does not reflect the unavailability of reasonable solutions to a purported solid waste "crisis", but rather illustrates the state's apparent unwillingness to explore even the most basic possible solutions, such as studying the available acreage statewide for sanitary land disposal facilities, to the solid waste problem purportedly confronting the state.

Appellees and the New Jersey Supreme Court have asserted that the impact of P.L. 1973, c. 363, on interstate commerce is only incidental. 68 N.J. at 475-76. At the outset it should be recognized that a statute the purpose and effect of which is to ban interstate commerce cannot plausibly be characterized as only incidentally affecting such commerce since, as this Court has stated, "... to prohibit interstate commerce is more than to indirectly affect it." *West v. Kansas Natural Gas Co., supra* at 249.

Congress has clearly recognized the interstate character and importance of solid waste disposal. Both in the Resource Recovery Act of 1970, P.L. 91-512, and the Solid Waste Disposal Act, P.L. 89-272, 42 U.S.C. §3251 (1970), as amended by the Resource Conservation and Recovery Act of 1976, P.L. 94-580, 42 U.S.C. §6901 *et seq.*, Congress directed the relevant federal agencies to encourage cooperative state and regional efforts in dealing with solid waste disposal, as well as to promote the achievement of reasonably uniform state and local laws pertaining to such disposal. Thus, while the regulatory sphere was left largely to the states,

Congress expressly attempted to promote approaches to solid waste disposal that transcend local jurisdictional boundaries.

P.L. 1973, c. 363, repudiates these congressional directives in the most severe manner possible, i.e., by shutting New Jersey off from the interstate transportation of waste materials. The most immediate effect of such a non-importation ban is that New York and Pennsylvania residents who have used New Jersey sites will now be prevented from utilizing such sites. Apart from the costs involved in such a redistribution of removal patterns, P.L. 1973, c. 363, if permitted by this Court to stand, threatens to create a multiplicity of non-importation statutes as the various states retaliate against one another. This effect is already evidenced by the fact that Pennsylvania, New Jersey's sister state, has enacted a non-importation ban subsequent to the enactment of and in retaliation against P.L. 1973, c. 363. See Pennsylvania Solid Waste Management Act, P.L. 788, *as amended,* 1974 P.A. 337.

This Court has repeatedly emphasized its function to assess the practical impact of a statute which affects interstate commerce. In this regard, the Court has acknowledge the importance of a statute's possible effect on interstate commerce through potential similar action of other states. In *Pennsylvania v. West Virginia,* 262 U.S. *supra*, at 596, the Court declared:

> [I]n the last analysis, the question is whether the enforced withdrawal for the benefit of local consumers is such an interference with interstate commerce as is forbidden to a state by the Constitution. The question is an important one; for what one may do, others may, and there are

> 10 states from which natural gas is exported for consumption in other states.

And the Court most recently restated this concern in *Great Atlantic & Pacific Tea Co. v. Cottrell:*

> To allow Mississippi to insist a sister State either sign a reciprocal agreement acceptable to Mississippi or else be absolutely foreclosed from exporting its products to Mississippi would plainly "invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause." *Dean Milk, supra*, 340 U.S., at 356, 71 S.Ct., at 299. No "parochial legislative polic[y]," *H.P. Hood and Sons, Inc. v. DuMond*, 336 U.S., at 538, 69 S.Ct., at 665, could be more precisely calculated to open the "door . . . to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S., at 522, 55 S.Ct., at 500.

96 S.Ct. at 932.

At least eight states have passed legislation which limits in varying degrees the importation of waste materials. And it appears that a number of other states are seriously considering enactment of non-importation legislation and are thus awaiting the decision of this Court in the instant case. There can be little doubt, therefore, that should P.L. 1973, c. 363, be permitted to stand, other states will surely follow in passing similar legislation.

The effect of such legislation would be precisely the same effect as this Court has decried in numerous past decisions. *See, e.g., Best & Co., Inc. v. Maxwell,* 311 U.S. 454 (1940); *Baldwin v. G.A.F. Seelig, supra; Pennsylvania v. West Virginia, supra.* Because the statute

in the instant case reveals no clear economic motive on its face, the appellees contend that it in no way raises the threat of "economic balkanization" which was one of the chief reasons for enactment of the commerce clause. This contention, of course, ignores the obvious economic discrimination, discussed earlier, resulting from the fact that New Jersey's legislation was premised in part on the desire to minimize disposal costs for New Jersey residents and businesses at the expense of out-of-state residents and businesses who utilize private landfill sites in New Jersey.

Moreover, appellees' contention also ignores what is certain to be the cumulative effect of non-importation statutes on interstate commerce. For example, some New Jersey communities currently dispose of wastes in adjacent areas of neighboring states. Should New Jersey residents be denied access to these disposal sites, just as residents of these states have been denied access to sites in New Jersey, the effect of this denial of access would be to confine the waste disposal business within each state's own boundaries. Thus, "The necessary tendency of the statute is to impose an artificial rigidity on the economic pattern of the industry," *Toomer v. Witsell*, 334 U.S. 385, 404 (1948), and, when viewed in conjunction with similar prohibitions enacted by other adjacent states, such as that imposed by Pennsylvania, the effect is in essence to "requir[e] business operations to be performed in the home state that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Pike v. Bruce Church, Inc.*, 397 U.S., *supra*, at 146.

In sum, if the statute in the instant case is allowed to

stand, the impact will not only thwart the declared congressional objective of promoting regional solutions to waste disposal problems, but will also force a significant interstate industry into an inefficient and economically damaging restructuring of its traditional business patterns.

III.

CONSIDERATION OF THE RESOURCE CONSERVATION AND RECOVERY ACT OF 1976, WHILE RELEVANT TO THIS CASE, SHOULD NOT OBSCURE THE IMPORTANT CONSTITUTIONAL ISSUE RAISED BY P.L. 1973, C. 363.

In remanding this case to the New Jersey Supreme Court on the question of whether P.L. 1973, c. 363, conflicts with the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901 *et seq.* ("Act"), this Court applied the established principle that questions of preemption, which are questions primarily of statutory construction, should be resolved, if possible, before reaching the constitutional issues presented by the case before the Court.

While amicus recognizes the rationale of the Court in remanding for consideration of the supremacy clause question, amicus respectfully submits that consideration of the Act should not obscure the fundamental constitutional commerce clause issue presented in the instant case. Concededly, neither the Act nor its legislative history reveals any express intent by Congress to preempt state regulation of the discarded materials problem, except to the extent Subchapter III of the Act bars a state from establishing regulations concerning hazardous waste which are less stringent than regulations issued under Subchapter III. However, non-importation

statutes such as P.L. 1973, c. 363, and the retaliatory legislation such statutes are certain to provoke, cannot help but ultimately frustrate any efforts at achieving the kind of cooperative regional solutions contemplated by the Act. Whatever state or local initiatives Congress meant to give full play, it is doubtful that an absolute barrier at state borders is such an initiative. If one of New Jersey's options left open by the Act was to opt out of regional solutions altogether, as it has, what answer is there to the frustration of Pennsylvania or other neighboring states that may wish to pursue regional solutions urged by Congress but which have been negated by New Jersey? New Jersey's blockade, in other words, is not an action that can be isolated as a local option. It is, by its nature, an action affecting and prejudicing choices by other states and clearly undermining the purposes of the Act.

An inevitable, if not immediate, frustration of congressional purpose seems evident. However, given the prospective nature of the supremacy clause question raised by the Act, yet the unmistakably clear discrimination against interstate commerce effected by P.L. 1973, c.363, amicus respectfully submits that the Court should face the commerce clause issue. The frustration of congressional purpose—as that purpose is evidenced by the Resource Conservation and Recovery Act—should be viewed as an aspect of the constitutional question of the discriminatory and burdensome nature of P.L. 1973, c.363, on interstate commerce, *see* discussion at pp. 32-35, *supra,* without need to resolve in a statutory context the question of conflict between the Resource Conservation and Recovery Act of 1976 and P.L. 1973, c. 363. In sum, then, the crucial commerce clause issue in this case – which amicus submits is

resolvable on the basis of well-established precedents of this Court – should not be obscured, nor its resolution delayed, by the less clear supremacy clause question presented by the Resource Conservation and Recovery Act of 1976.

CONCLUSION

Public Law 1973, chapter 363, was enacted solely to bar the flow of commerce in waste material, much of which is valuable and merchantable, and all of which is the subject of a substantial interstate commerce activity. This radical approach was chosen without any meaningful consideration of alternatives that would not restrain commerce. And the use of such an approach will have minimal effect in solving the alleged problem that inspired it.

This is not a case of balancing serious environmental and conservational motives against an incidental burden on commerce, nor is this a case of a state's attempting to restrict access by nonresidents to the state's public services or facilities. Rather this is a flat prohibition on commerce – a prohibition aimed at private commercial enterprises, and meant to spare the state the burden of pursuing meaningful environmental or conservational approaches to waste management. It is an action by

New Jersey almost certain to breed similar actions in retaliation by other states. This is a classic case of discrimination against interstate commerce which cannot pass muster under the Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We hereby certify that on this 13th day of January, 1978, three copies of this Brief For National Solid Wastes Management Association as Amicus Curiae were mailed with adequate first class postage prepaid, to Assistant Attorney General Stephen Skillman, at his office located in the State House Annex, Trenton, New Jersey, 08625; to Herbert F. Moore, Esquire, attorney for appellant, at his law office located at 19 Chancery Lane, Trenton, New Jersey, 08618; to Vincent J. Dotoli, Esquire, attorney for plaintiffs-intervenors at his law office located at Interstate 287 & McKinley Street, Plainfield, New Jersey, 07080; and to David N. Samson, Esquire, Attorney for defendants-respondents in the companion case *Hackensack Meadowlands v. Mun. Landfill Auth.*, (decided November 18, 1975), at his law office located at 80 Main Street, West Orange, New Jersey, 07052.

We further certify that all parties required to be served have been served.

By _____
William C. Brashares

By _____
Paul M. Laurenza